No. 5518

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

GEORGE SHALLAS,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

## BRIEF OF APPELLEE

*Upon appeal from the District Court of the United States, for the District of Idaho Northern Division*

H. E. RAY,
United States Attorney

W. H. LANGROISE,
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Assistant U. S. Attorneys.
Attorneys for Appellee.

Filed.....1929

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# SUBJECT INDEX

# TABLES OF CASES AND RULES OF COURT

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### STATEMENT OF THE CASE

On the 29th day of May, 1929, an indictment was returned against the appellant George Shallas by the Grand Jury charging him with the crime of perjury.

George Shallas was tried and convicted by a jury on the 4th day of June, 1929 (Tr. p. 18). On the

5th day of June 1929, appellant was sentenced by the court to pay a fine of one thousand dollars and be confined at McNeil Island for a term of 18 months (Tr. p. 18 and 19).

A petition for a new trial was filed on the 5th day of June 1929. (Tr. p. 10 and 11), and an amended petition for a new trial was filed on the 28th day of June 1929. (Tr. p. 17).

On the 11th day of July 1929, at Boise, Idaho, the court entered an order denying the petition for a new trial, (Tr. p. 17).

On June 19, 1929, the May term of court for 1929, Northern Division, District of Idaho was adjourned without day (Tr. p. 70 and 71).

On the 27th day of July, 1929, the appellant made application for an order extending the time in which to prepare and file a bill of exceptions (Tr. p. 7, 8, and 9) and on the 27th day of July 1929, an order extending the time to file the bill of exceptions was signed by the Federal District Judge (Tr. p. 9).

Objections to the settling and allowing of the proposed bill of exceptions was filed by appellee (Tr. p. 19 and 20) which objections were denied and an exception allowed (Tr. p. 20).

The Bill of exceptions was lodged August 5, 1929, and settled and allowed August 14, 1929, (Tr. p. 66).

The case is here on appeal.

## FACTS

We will not take the time of the court to detail the appellee's proof with respect to the jurisdiction of the court in the case of U. S. vs. Theodore Sievers, being case number 2828, the taking of the oath by Shallas, the materiality of the testimony given by Shallas in that case or of the testimony actually given in that case by this appellant for as we read appellants brief no question is raised with respect to these matters but only as to the sufficiency of appellee's proof of the falsity of such testimony.

Theodore Seivers was called as a witness and testified in substance that he was the Theodore Seivers who had been theretofore charged with the possession and sale of moonshine whiskey at Tensed, on the 14th day of October, 1928, and had been tried in November 1928 at Coeur d' Alene, Idaho, and had thereafter and during the May term of court 1929 at Coeur d' Alene entered a plea of guilty to said information and had been indicted by the Grand Jury for perjury in case No. 2917, in connection with his testimony in the liquor case and had entered a plea of guilty to that (Tr. p. 24). He further testified that he was arrested the latter part of October, on the liquor charge and about a week after the preliminary hearing at Plummer, Idaho, he had seen and talked with the appellant at Spokane. That he at that time explained to George Shallas that he wanted to prove that he was not in Tensed on Sunday, October 14th, 1928, the day that he sold the

whiskey, and that he explained to Shallas that he had sold the whiskey and did not think that any body had seen him (Tr. p. 24 and 25). That Shallas then asked him whether or not he was sure that nobody had seen him and that Shallas then said "We will fix the register up so that we can show that you were here on the 13th and 14th and did not check out until the 15th." (Tr. p. 25). That Shellas then went and got a pencil and erased the "14" (Tr. p. 25) upon plaintiff's Exhibit 3, the register sheet referred to and which shows Mrs. Theodore Seivers had registered. (Tr. p. 25). The register sheet shown as plaintiff's Exhibit 3 and changed by Shallas shows room No. 36 as the room occupied by Theodore Seivers; the entry which was changed is "A. J. Logi, Seattle, Room 36, 10/15." the "4" was erased and a "5" made over it. After the erasure George Shallas put a little dirt on it so it would not be noticed (Tr. p. 27).

"George Shallas also gave me a little piece of paper showing where I had given him $3.50 for the room rent for the 13th and 14th." Theodore Seivers testified that he gave the receipt to Mr. Wernette and has not seen it since then (Tr. p. 27). That he and his wife did not stay at the Ethelyn Hotel on the night of Sunday, October 14th, 1928; that he did not see George Shallas, this defendant, at any time during the day of October 14th, 1928 (Tr. p. 27). That he was in Spokane the afternoon and

night of Saturday, October 13th and that his wife was with him and that they stayed at the Ethelyn Hotel (Tr. p. 27 and 28). That on Sunday the 14th they got up between seven and eight o'clock. That he went out to get the car while his wife dressed and then went up and got her and they left and went over to St. Lukes Hospital to get his sister-in-law, Ruby Ohler (Tr. p. 28). That they drove around for a while and then went down to the Christian Science Church which let out about 12 o'clock and after that they parked down town a little while and had their dinner and that they then dropped the sister-in-law, Ruby Ohler off at her home (Tr. p. 28). That he did not see George Shallas the morning of October 14th, (Tr. p. 28). That he was in Tensed the late afternoon and evening of October 14, 1928, and that his wife Laura Seivers remained in Tensed, that night. That he sold a pint of whiskey to Suzanne Lawrence during the early part of the evening as charged in the information in case No. 2828, (Tr. p. 29). That he arrived in Tensed on October 14th, 1928, between 4:30 and 5 o'clock as best he remembered and was there all the rest of that day and night until the next morning (Tr. p. 29), and that he left Spokane around one o'clock, (October 14, 1928) (Tr. p. 29).

That the receipt was given to him by George Shallas several day before the trial (referring to case No. 2828, the liquor case that was tried in

November 1928), and some time after the 15th of October, and that he did not pay the appellant at the Ethelyn Hotel the amount shown on the receipt (Tr. pp. 30, 31). That he was 26 years old and had not been sentenced on the charges of selling liquor and perjury. (Tr. p. 31). That his wife and mother-in-law were bound over for perjury committed in this same transaction (Tr. p. 31). That he never had any understanding with respect to the charges being dropped against his wife and mother-in-law with anybody (Tr. p. 32). That he first saw the hotel register in George Shallas' room about two weeks after this liquor deal and that George Shallas gave it to him to take to Mr. Wernette and that he had it in his possession for several hours, only long enough to go from Spokane to Coeur d' Alene, (Tr. pp. 33 and 34). That he never had it in his possession after that, (Tr. p. 34).

W. D. McReynolds, the clerk of the District Court for the District of Idaho, testified that plaintiff's Exhibit, number 3, is the same exhibit that was offered as defendant's exhibit, number 2, in the case of United States vs. Theodore Seivers, (the liquor case) (Tr. p. 25), and that George Shallas was a witness in that case and identified the register as the original record of his hotel. (Tr. p. 26). That he had the register in his custody until a day or two before he (W. D. McReynolds) testified; that he had given it to the District Attorney and that it was

kept in the files of the court and he could not testify whether it was in the same condition now as then (Tr. p. 26). That he did not recall of any reference being made at the trial in November to the fact that room 36 was registered for by another person on the 15th, (Tr. p. 26).

W. H. Langroise was called as a witness and testified that he got plaintiff's Exhibit number 3 from Mr. McReynolds and that it had been in his possession at all times since then and that it was in the same condition as when he got it from Mr. McReynolds, (Tr. p. 26).

N. D. Wernette was called as a witness and testified that he was an attorney at Coeur d' Alene and represented Theodore Seivers in Case number 2828, and that either Mr. Seivers or Mrs. Seivers gave him a piece of paper purporting to be a receipt from the Ethelyn Hotel signed by George Shallas some time prior to the trial of Case number 2828, and shortly after Seiver's arrest; that he has been unable to locate the same and that it was never introduced at the time of the trial, (Tr. p. 30).

The testimony of the witnesses from Tensed, and the testimony of the defense which except that of the appellant Shallas is not at all contradictory to the testimony of the government will be discussed in the argument itself.

## BRIEF OF ARGUMENT

This court is precluded from considering this bill of exceptions as a part of the record in this case.

Rule 76 District Court Rule for District of Idaho.

Anderson vs. U. S. 269 Fed. 65.

Michigan Insurance Bank vs. Eldred, 143 U. S. 293.

O'Connell vs. U. S., 253 U. S. 142.

Great Northern Life Insurance Company vs. Dixon, 22 Fed. (2nd) 655.

Spokane Interstate Fair Association vs. Fidelity and Deposit Company of Maryland. 15 Fed. (2) 48.

A bill of exceptions settled and allowed by a court without jurisdiction will not be considered on appeal.

Michigan Insurance Bank vs. Eldred, supra.

G. N. Life Insurance Company vs. Dixon, supra.

Appellants motion for a directed verdict was properly denied.

Evidence sufficient to sustain the verdict.

U. S. vs. Woods, 39 U. S. 428.

Hammer vs. U. S., 271 U. S. 620.

Underhill's Criminal Evidence 3rd edition, page 917, Sec. 682.

Holy vs. U. S., 278 Fed. 521.

Gordon vs. U. S., 5 Fed. (2) 943.

Hashagen vs. U. S., 169 Fed. 399.

A conviction of perjury may be sustained upon the

testimony of a single witness if the testimony of the defendant is unsatisfactory and contradictory.

Vedin vs. U. S. 257 Fed. 550.

State vs. Miller, 24 W. Va. 802.

## ARGUMENT

## THIS COURT IS PRECLUDED FROM CONSIDERING THE BILL OF EXCEPTIONS AS A PART OF THE RECORD IN THIS CASE.

Rule 76 of the District Court for the District of Idaho, provides the different ways in which a bill of exceptions to any ruling may be reduced to writing and settled. They are as follows, (1) may be reduced to writing and settled and signed by the judge at the time the ruling is made, (2) or at any time during the trial if the ruling was made during the trial, (3) or within such time as the court or judge may allow by order made at the time of the ruling or if the ruling was during the trial, any time during the trial,—and if not settled and signed as above provided, then (4) it may be settled and signed if the party desiring the bill of exceptions shall within 10 day after the ruling is made or if the ruling was made during the trial, within 10 days after the rendition of the verdict serve upon the adverse party a draft of the proposed bill of exceptions. Tr. pp. 74, 75 and 76)

Rule 76 which has been sub-divided into four parts by us for the purpose of argument is the only rule

of the District Court for the District of Idaho, having to do with the settling and allowing of the bill of exceptions.

An examination of the record discloses that the application for an order extending the time in which to prepare and file a bill of exceptions was not filed and the order itself was not secured until nearly two months after the rendition of the verdict in this case, and over a month after the 1929 May term of court for the Northern Division of the District of Idaho, had adjourned sine die.

Appellant in his brief assumes that the motion for a new trial stays the running of the time for preparation and filing of the bill of exceptions. We do not believe this to be the law. It is true that the 5th Circuit Court of Appeals in the case of U. S. Shipping Board vs. Galveston Dry Dock, etc., 13 Fed. (2) 607, held that the motion for new trial would stay the running of the time for signing a bill of exceptions until the court had acted on the motion, but in support of its position it cites Texas & Pacific R. R. Co. vs. Murphy 111 U. S. 488, which as we read it does not support the contention at all. The Supreme Court decision holds that it does stay the time for the suing out a writ of error or in other words the time in which an appeal may be taken. But the time in which an appeal may be taken and the preparation of a bill of exceptions are not the same. An appeal may be taken on the record and

no bill of exceptions be a part of that record. Under the rules of the Idaho district, ten days from the time of the rendition of the verdict without further extensions is all the time that one may have for the preparation, serving and filing of the bill of exceptions, while one has 90 days in which to take an appeal. For the purpose of argument, assuming that the appellant's motion for a new trial did stay the time in which the bill of exceptions might be prepared, served and filed, until the motion was acted upon by the court, it is our position, that appellant's bill of exception was still too late.

Appellant in his brief on page 20, has inadvertently stated that the judge rendered a memorandum opinion and signed an order denying the petition for a new trial on July 17, 1929, when as a matter of fact the record discloses that the memorandum opinion and order denying petition for new trial was made on July 11, 1929, (Tr. p. 17), and the application for an order extending time in which to prepare, file and serve a bill of exceptions was not made until the 27th day of July, 1929, (Tr. pp. 7, 8, and 9), and the order extending the time to file the bill of exceptions was not made until the 27th day of July, 1929, (Tr. p. 9).

In other words, the bill of exceptions was neither served or filed within 10 days of the time of the denying of the petition for a new trial nor was there any order extending the time in which to prepare,

serve and file a bill of exceptions within the 10-day period, but rather such order was secured some sixteen days after the order denying the petition for new trial.

The trial court was without jurisdiction to make any order extending the time or to settle or allow a bill of exceptions on July 27, 1929, for the reason that it was not within ten days of the time of the rendition of the verdict or the denial of the petition for a new trial, and not during the same term at which the case was tried and the verdict rendered by the jury.

This court passed upon this question in the case of Anderson vs. U. S. 269 Fed. 65, at page 79.

> "As to all of the plaintiffs in error except Fox, we think it clear that we are precluded from considering the bill of exceptions as a part of the record, for the reason that the term of the court during which both the verdict and judgment against them were rendered had expired prior to the signing of either of the orders undertaking to extend the time for the preparation, service, or settling of such bill. In support of this conclusion we need to do no more than refer to the very recent decision of the Supreme Court in O'Connell et al vs. U. S., 253 U. S. 142"

The Supreme Court of the United States in discussing the jurisdiction of a court to allow a bill of exceptions or amend a bill of exceptions laid down the following rule:

> "After the term has expired without the courts control over the case being reserved by

> standing rule or special order and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed is at an end."
>
> Michigan Insurance Bank vs. Eldred, 143 U. S., 293 at page 298.

And again we find the Supreme Court of the United States at a later date using the following language after quoting from its decision in Michigan Insurance Case vs. Eldred:

> "We think the power of the trial court over the cause expired not later than the 15th of December 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not therefore consider the bill copied in the record".
>
> O'Connell vs. U. S. 253 U. S. 142 at page 147.

The rule with respect to the settling and signing of bill of Exceptions in the 8th Circuit is laid down in the case of Great Northern Life Insurance Company vs. Dixon, 22 Fed. (2nd) 655 at 657:

> "The rules which condition the settling and signing of a bill of exceptions are well established. The court has jurisdiction to settle and sign a bill of exceptions during the judgment term and any valid extension thereof. The extension of the term may be made (1) by standing order; or (2) by special order made during the judgment term or a valid extension thereof. At the end of the judgment term and any valid extension thereof, the court loses jurisdiction to settle and sign a bill of exceptions".

This court again considered when a bill of exceptions may be settled and allowed in the case of Spokane Interstate Fair Association vs. Fidelity and Deposit Company of Maryland, 15 Fed. (2) 48. In this case, however, the question as to the jurisdiction of the court could not be raised for the extension was granted by the court within the time given by the rules of the court in which a bill of exemption may be prepared, but we cite this case for the reason that it does in principle, re-affirm the necessity of the jurisdiction of the court at the time the order is made.

> "That being true and the court still *having jurisdiction to grant such extensions* when the orders were made, neither motion is thought to be well taken and both are therefor denied." (Italics ours).

The rule laid down in the cases above cited require that in this case for the court to have had jurisdiction to make an order extending the time in which to prepare, file and settle a bill of exceptions such order must have been made within the time allowed by rule 76; that is by June 14, 1929, or if the petition for new trial did stay the time, then not later than July 21, 1929, and if the order was made at a time after these dates and after the term had been adjourned sine die and after the 10-day period had elapsed, the court had no jurisdiction in which to make the order and was likewise without power or

jurisdiction to settle or allow any bill of exceptions in conformity with said order,

A BILL OF EXCEPTIONS SETTLED AND ALLOWED BY A COURT WITHOUT JURISDICTION WILL NOT BE CONSIDERED ON APPEAL.

> "By the uniform course of decisions no exceptions to rules at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties, and, save under very extraordinary circumstances, they must be allowed by the judge and filed by the clerk during the same term."
>
> Michigan Ins. Bank vs. Eldred,—supra.
>
> "It follows that the settling and signing of the bill of exceptions was *coram non judice*, and, though it is returned here, it cannot be considered as a part of the record."
>
> G. N. Life Ins. Co. vs. Dixon, supra.

The specifications of error in this case are all predicated and dependent upon appellant's bill of exceptions, and if said bill of exceptions as we contend, is not before this court, then there is nothing more to consider with respect to this appeal.

APPELLANTS MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED.

Under the indictment in this case the government was not bound to prove that Seivers was not at the Ethelyn Hotel at all on October 14, 1928, but rather all that the government need prove under the indictment was that Seivers was not at the Ethelyn Hotel, Spokane, Washington, at the time or times on the afternoon of October 14, 1928, that Shallas testified that he was, and that Shallas did not see him there at those times.

The questions and answers set up in the indictment as testified by appellant in the liquor case which refer to the 14th of October, 1928, and the afternoon and evening of that day, are as follows:

"Q. Calling your attention to October 14th, you say you saw the defendant, Theodore Seivers at your hotel?

A. Yes.

Q. About what time did you first see him there on that day?

A. I seen him in the morning once, around 9:30 or 10 o'clock.

Q. When did you next see him?

A. In the afternoon.

Q. What time?

A. A couple of times between three and five.

Q. You saw him twice between three and five?

A. Yes." (Tr. p. 5).

The Indictment then alleges:

> "Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethelyn Hotel in the city of Spokane, State of Washington, during *the afternoon and evening of October* 14*th*, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, *or* at any other time on that day, and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers *during the afternoon* of October 14th, 1928, at the Ethelyn Hotel *or any other* place in the city of Spokane, in the State of Washington, whereby he**********" (Italics are ours) (Tr. pp. 5 and 6).

It becomes apparent that the Indictment alleges the truth to be (1) That Theodore Seivers was not at the Ethelyn Hotel in the city of Spokane, State of Washington, during the afternoon and evening of October 14th, 1928, during the time or times that the said George Shawle alias George Shallas testified he was there. (The times that Shallas testified that he was there were a couple of times between three and five o'clock in the afternoon of that day). (2) The indictment next alleges that Theodore Seivers was not there at *any other time* on that day.

In other words the indictment sets up two distinct allegations as to when Seivers was not at the Ethelyn Hotel on October 14, 1928,—(1) That he was not there twice between two and three o'clock in the afternoon and evening of October 14, 1928, and (2) That Seivers was not there at any other time on that

day. The only other times that Shallas testified that Seivers was there on that day was once between nine-thirty and ten in the morning and that he stayed there Sunday night (October 14, 1928). So the second allegation was directed to the answers of Shallas concerning times that Seivers was at the Ethelyn Hotel, other than twice between three and five in the afternoon. If the second allegation was a sufficient allegation of the truthfulness in that respect then, provided the government had been able to have proved to the satisfaction of the jury that Seivers was not there at those times it would have been sufficient, even though the government was unable to make the proof with respect to the afternoon. So, also the government could make its proof as to the two times between three and five in the afternoon and stand on that alone. There can be no question of the sufficiency of the allegations concerning what the truth was with respect to the afternoon.

Appellant concedes in his brief that there may be several perjuries alleged in one count and that proof with respect to any one is sufficient.

No contention is made that the indictment does not charge a crime; there is no specification of error with respect to that, no demurrer interposed or motion in arrest of judgment, sufficiency of the evidence to sustain the burden of proof imposed upon the government with respect to the afternoon of October 14, the only question raised by specification of error number one.

EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT.

Appellant argues that the evidence was insufficient for the reason that it consisted solely of the uncorroborated testimony of Seivers. There is no dispute that in perjury cases one cannot be convicted upon the testimony of a single witness uncorroborated; also the appellant and the government agree that one can be convicted of perjury upon the testimony of one witness corroborated by other circumstances independently proven. We will discuss the only question involved under this head, that is the degree of corroboration required by the courts.

Perhaps the most exhaustive discussion of the old rule with reference to perjury, and the modifications thereof, is in the case of U. S. vs. Woods, 39 U. S. 428. It is referred to by the Supreme Court in the case of Hammer vs. U. S., 271 U. S., page 620, at page 628, where the court says:

> "That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in U. S. vs. Wood, 14 Pet. 430, 433. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, *does not relate to the kind or amount of other evidence required to establish that fact.*" (Itallics ours)

The court does not attempt to lay down a rule that requires any particular amount or kind of corrobora-

tion. In the present case the court instructed the jury that they could not convict upon the testimony alone of Theodore Seivers; that they must find that this testimony was corroborated by other facts and circumstances established independently of his testimony, and under that instruction they found the defendant Shallas guilty, and in effect that the testimony of Seivers was corroborated.

This view is substantiated by Underhill's Criminal Evidence, 3rd Edition, page 917, Sec. 682, where it is said:

> "All relevant evidence, which, if true, tends to corroborate him, should go to the jury, and it is for them to determine whether the corroboration is sufficient to convince them of the falsity of the defendants testimony beyond a reasonable doubt."
>
> "It has been held repeatedly that while corroboration is essential, the additional evidence need not be such as standing by itself, would justify conviction in a case where the testimony of a single witness is sufficient for a conviction. The written or oral admission of the accused, or documentary evidence found in his possession, or in the possession of those who may be criminally associated with him, may be received as corroborative, and these, if believed by the jury, will be equivalent to another witness."

With respect to the latter part of the statement above quoted, we call attention to the register sheet of the Ethelyn Hotel which hotel was being operated by the defendant Shallas, together with some others, to the testimony relative to the change in the regis-

ter, and the introduction of the register, and that, in and of itself, irrespective of any other testimony, would be sufficient corroborative evidence and be, in the language of Underhill "equivalent to another witness."

Concerning appellants argument that the register sheet could have been changed by Seivers, we call attention to the fact that had Shallas' story been true there would have been no occasion for the alteration in the register, because unchanged it would have supported his testimony. He testified that the room was occupied by Seivers and that he had made arrangements for it, so, of course, it would not have been rented to anyone else.

The Ninth Circuit Court of Appeals in the case of Holy vs. U. S., 278 Fed. 521, states:

> "A conviction of perjury may be based upon the testimony of a single witness supported by documentary evidence."

The Circuit Court of Appeals for the Eighth Circuit in the case of Gordon vs. U. S., 5 Fed. (2) 943, at page 945, in discussing the rule relative to the evidence sufficient to sustain a conviction of perjury, says:

> "Conceding that there was a time when a rule prevailed in many courts to the effect that the testimony of two witnesses, or of one witness and corroborating circumstances, was essential to sustaining a conviction for perjury, that rule has long since been relaxed, and such testimony is no longer essential to warrant a verdict of

> perjury. Clear and direct testimony of one or more witnesses, or the testimony of one witness and convincing corroborating circumstances, or indubitable facts absolutely incompatible with the truth of the testimony charged to be false, may be ample to sustain a verdict of perjury."

The same court in a much earlier case, Hashagen vs. U. S., 169 Fed. 396, at page 399, used the following language:

> "But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon testimony of a single witness, corroborated by circumstances proven by independent evidence *sufficient to warrant the jury in saying that they believed one rather than the other.* In other words, the evidence of the witness, together with the other facts and circumstances proved on the trial, must be something more than sufficient to counterbalance the oath of the defendant and the legal presumption of his innocence." (Italics ours)

As we view the decisions hereinbefore cited, the tendency of the courts has been to relax generally the rule relative to the conviction for perjury and the rule as the courts not define it, is that a conviction for perjury may be had upon the testimony of a single witness, if there is any other evidence introduced or facts independently proven or documentary evidence or other circumstances from which the jury might find that the testimony of the single witness is substantiated or corroborated sufficiently for them to say that they believe beyond a reasonable doubt the truth of the charge.

The following synopsis of the testimony of the witnesses as to the presence of Theodore Seivers at Tensed, Idaho, during the afternoon and evening of October, 14th, 1928 is further corroboration of the fact that Theodore Seivers was not in the Ethelyn Hotel at Spokane, Washington, on two occasions between three and five o'clock on the afternoon of October 14th, 1928.

*W. A. Shaw* testified that he attended a dinner party at the W. H. McNeal residence in Tensed, Idaho, on October 14th, 1928; it was a farewell dinner as Mr. McNeal was leaving; that he saw Theodore Seivers during the afternoon of October 14th, at Tensed, Idaho. That he first saw Theodore Seivers drive up in his car in front of his residence with his wife, Mrs. Laura Seivers; they got out of the car and Theodore Seivers took out some packages out of the car and they went in the house; that Theodore Seivers came back out again but that Laura Seivers did not; that he had occasion to pass by the Seivers place on the afternoon of October 14, 1928, twice, at one time about four o'clock and another time about five o'clock, and that at both times he saw Seiver's car there. (Tr. p. 35).

Obviously from this testimony it was sometime prior to four o'clock in the afternoon that W. A. Shaw saw Seivers come there with his wife, and remove some packages, because he testified that he saw them come there and move these packages and he

passed their residence on two different occasions, once about four and once about five, and on both occasions saw the car there.

*W. A. Weiss* testified that he attended this farewell dinner given at Mr. McNeal's place at Tensed, Idaho, on October 14, 1928, and that he saw Theodore Seivers around the car in front of his place where he lived at Tensed, Idaho, as follows: (Tr. p. 37).

> "Yes, I seen them there around that car probably three or four times that afternoon. In fact, Ted was working on the car and he was in and out of the house and around the car practically all afternoon." (Tr. p. 37).

He also testified that he saw the car some time between 6:30 and 7:00 o'clock when he left for home. (Tr. p. 38).

*W. H. Phillips* testified that he lived at Tensed, Idaho, and was a farmer laborer. That he attended the dinner at McNeal's on October 14th, 1928, at Tensed, Idaho. (Tr. p. 38). That there were two servings of dinner at the McNeal place that afternoon, and that he had a second serving. (Tr. p. 40). That he arrived a little late, that upon arriving there he saw Theodore Seivers and his wife in front of the Seivers place at Tensed, Idaho; that he thought it was somewhere around one thirty in the afternoon of October 14, 1928. (Tr. p. 39). This witness testified positively that at the time he went to the McNeal home for dinner, that he saw Seiver's car and Seivers

and his wife in front of the Seiver's place in Tensed, Idaho, so he fixes the time by that fact; he testifies that he came there late and had dinner during the second serving. (Tr. pp. 38 and 39).

*W. H. McNeal* testified that during October 1928, he lived in Tensed, Idaho, where he was engaged in business. That on October 14, 1928, he gave a farewell dinner at his place as he was leaving for Davenport, Washington. He named the parties present at the dinner. (Tr. p. 40). That he was acquainted with Theodore Seivers and his wife and knew the car that they drove, which was a Maxwell coupe, that he saw Seivers the afternoon of the 14th of October, 1928; that the car drove up in front of Seiver's house and they got out and Seiver's wife went into the house and Seivers went around the car and got some parcels out and then went into the house. (Tr. p. 40). That he did not notice the car being taken away from there at any time after that, or any time that evening. He said he was not able to give the exact time that he first saw them, but that dinner was served about one o'clock and that after they had eaten they had gone outside probably around 1:30 or 2 o'clock, and that Seivers and his wife drove up while McNeal and some of his company were out front talking. He was not able to say just how long it was after they had gone out in front of his place. (Tr. p. 41).

McNeal's testimony, taken together with the testi-

mony of Weiss, would indicate that perhaps somewhere around two or two-thirty during that afternoon, was the approximate time that Seivers came there, and that from that time on, for the rest of the afternoon and that evening, Seiver's car remained there in Tensed, Idaho. This evidence positively precludes all possibility of Seivers being at the Ethelyn Hotel in Spokane, Washington, on the two occasions between three and five o'clock during the afternoon of the 14th day of October, 1928.

The next witness to testify for the government was the witness *R. J. Hart,* who testified he was a special officer in the Indian Service and was working on the Coeur d' Alene Indian Reservation; that he was in Tensed, Idaho, on October 14th, 1928, and that he saw Theodore Seivers there during the afternoon of the 14th day of October, and also his car, a Maxwell coupe. That he did on several occasions go through Tensed during the evening of October 14th, 1928, and in the early morning of the 15th about six o'clock. (Tr. pp. 41 and 42).

The testimony of the witnesses whose evidence we have just briefly outlined, shows that Theodore Seivers and his wife drove up in front of their house in Tensed, Idaho, on October 14th, 1928, some time between two and three o'clock during the afternoon of October 14th, 1928, and that the said Seivers was seen in and arround the car all of the rest of the afternoon and that his car, the Maxwell coupe, re-

mained in front of his place from then on, and was not removed during that afternoon or evening.

The evidence also affirmatively shows that Tensed is located some 60 miles out from Spokane, Washington, where the Ethelyn Hotel is situated, thus making it impossible for Shallas to have seen Theodore Seivers in the Ethelyn Hotel on two different occasions between three and five o'clock, during the afternoon of October 14th, 1928.

It seems to us that this testimony certainly corroborates the testimony of Theodore Seivers that he was not in the Ethelyn Hotel on two different occasions or at any time during the afternoon of October 14th, 1928, because it makes it impossible for him to be there at the times which the appellant Shallas testified that he was on that afternoon.

A CONVICTION OF PERJURY MAY BE SUSTAINED UPON THE TESTIMONY OF A SINGLE WITNESS IF THE TESTIMONY OF THE DEFENDANT IS UNSATISFACTORY AND CONTRADICTORY.

This court in a decision rendered where there was involved a charge of perjury does not directly discuss in so many words the question of corroboration, but it does discuss the degree of proof required which we believe to be one and the same thing.

The case to which we refer is Vedin vs. United States, reported in 257 Fed., 550; the opinion of the court was delivered by Circuit Judge Gilbert. In

that case, an indictment was returned by the Grand Jury, charging the defendant with perjury arising out of certain affidavits made by him relative to assessment work supposed to have been done upon certain mining property in Alaska. The court was of the opinion that the testimony of the government was wholly insufficient to sustain a conviction of the crime of perjury, but says that the defendant saw fit to take the witness stand himself and testify and because of his testimony which was contradictory and unsatisfactory, that, that in and of itself was sufficient to justify a verdict of guilty for the crime of perjury.

Vedin vs. United States, 257 Fed. 550 at p. 552.

> "The evidence for the prosecution, if it stood alone, would clearly be insufficient to sustain a conviction of perjury.********If the plaintiff in error had stood upon his motion to dismiss, made at the close of the testimony, a different case would now be presented. But he waived his motion by testifying in his own behalf, and in the discrepancy of his own testimony as to the work done, and by whom it was done, and the rebuttal of portions thereof by the witnesses for the government, there is evidence tending to show that the affidavits were false,—Judgment sustained." Petition for a Writ of Certiorari denied.
>
> 260 U. S. 663.

This is the same as saying that even though the government's case is insufficient to warrant a verdict, if the defendant sees fit to take the stand him-

self and his testimony is contradictory and unsatisfactory, that, in and of itself, will satisfy the degree of proof required by the courts in perjury cases.

It is applicable to the case here under discussion for the reason that Shallas himself saw fit to take the witness stand and his testimony was contradictory in many respects and we believe highly unsatisfactory.

The following are some of the contradictions:

At the time appellant testified in case Number 2828, which testimony was the foundation of the perjury charged, Shallas testified positively that Seivers was at his hotel twice between three and five the afternoon of October 14, 1928, and that there was no chance of his being mistaken. (Tr. p. 49). Then at the time of the trial of this case, Shallas qualified the statement by saying as best he could recall, but admitted that he had not qualified his answers before in any way, (Tr. p. 49). Also Shallas admitted that he had testified in the liquor case that Seivers checked out on the morning of October 15, 1928, and that Seivers paid Shallas personally at that time, (Tr. pp. 48 and 49). In the present case Shallas testified that Mrs. Seivers paid him one night's room rent when she came there Saturday, (October 13, 1928), (Tr. p. 48). Shallas also testified in the present case that he did not know Mrs. Seivers signature and that he did not see her sign the register as he was sitting in the lobby. (Tr. p.

52). But Shallas, a witness in his own behalf, in this case, testified that as a witness in case number 2828, he identified the signature of Mrs, Seivers on the register sheet. (Tr. p. 47). Shallas testified in case number 2828, that they (Mr. and Mrs. Seivers) stayed at the hotel Sunday night (October 14, 1928), (Tr. p. 5). Then herein as a witness in his own behalf testified that he did not know whether Seivers slept in the room Sunday night, but that he did know that Seivers had made arrangements for that room Sunday night, (Tr. p. 48). And again during Shallas' testimony in his own behalf he testified that his best recollection was that they stayed there on the 13th, 14th and 15th, and that he saw them (Seivers) there Sunday afternoon *or* Monday, (Tr. p. 54). In the liquor case he testified positively (Tr. pp. 49, 4 and 5).

There are many other conflicts in Shallas' testimony.

We find this rule further supported in the case of State vs. Miller, 24 W. Va. 802.

> "When a prisoner testifies in his own behalf, his manner of giving testimony may be sufficient corroboration to justify conviction on the testimony of one witness for the prosecution."

## SPECIFICATION OF ERROR 2.

It was no error for the court to refuse to give appellant's requested instruction No. 2, as it would have been an erroneous statement of the law applicable to this case under the allegations of the indict-

ment as in this brief just discussed. This requested instruction would have precluded a verdict of guilty, unless the jury found in favor of the government upon each and all, of the several allegations of falsity. It was sufficient to find in favor of the government upon one only. Under the evidence, if the requested instruction was correct, the court should never have permitted the case to go to the jury, but would have been required to direct a verdict of acquittal, since the government itself proved that Seivers was in Spokane on the morning of October 14. But the material fact in the liquor case was Seiver's whereabouts during the afternoon of October 14, when the sale took place at Tensed. This Shallas knew, because Seivers had told him of the sale, and this, the indictment alleges to have been one of the false material matters testified to by Shallas in the liquor case.

The same argument is true of the exception taken to the instructions given by the court.

We respectfully submit there is no error and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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